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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
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9 RAMON A. LASAO, *et al.*,

10 Plaintiffs,

11 v.

12 STEARNS LENDING COMPANY, *et al.*,

13 Defendants.
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Case No. 2:10-CV-01864-KJD-LRL

ORDER

16 Presently before the Court is Defendants, BAC Home Loan Servicing, LP, Recontrust
17 Company, N.A., Mortgage Electronic Registration System (“MERS”), and Aurora Loan Services’,
18 (herein referred to collectively as “Defendants,” unless otherwise specified) Motion to Dismiss (#12).
19 Plaintiffs filed a response in opposition (#14) to which Defendants replied (#16). Also before the
20 Court is Defendants Stearns Lending Company (“Stearns”) and Carriage Escrow, Inc.’s Joinder to
21 Motion to Dismiss and Reply in Support of Motion to Dismiss (#17).

22 **I. Background**

23 On or about February 22, 2005, Plaintiffs jointly purchased property located at 940
24 Encorvado Street, Las Vegas, Nevada 89138 (“Property”). Plaintiffs received a primary loan
25 (“Loan 1”) in the amount of \$394,450 using the Property as collateral in connection therewith.
26 Plaintiffs also executed a Deed of Trust designating Plaintiffs as borrowers/trustors, Stearns as the

1 original lender, Carriage as the original trustee and MERS as the beneficiary, “solely as a nominee
2 for Lender and Lender’s successors and assigns.”¹

3 Plaintiffs also received a secondary loan (Loan 2) in the amount of \$97,350.00 with a 5.6%
4 interest rate secured by Deed of Trust with Stearns as the lender, Carriage as the trustee and MERS
5 as the beneficiary, listed again “solely as a nominee for the Lender and Lender’s successors and
6 assigned.” See Complaint, ¶ 22. Plaintiffs subsequently defaulted on both loans, alleging that
7 “overvaluation of the Property and ... confusion over the terms of the loan and who serviced and
8 owned the loan caused Plaintiffs to question the true identity of their lender and who was entitled to
9 payment.” See Complaint, ¶23.

10 Plaintiffs inquired about the true identity of the lender by sending a Qualified Written
11 Request to Defendants. According to the Notice of Default and Election to Sell, dated March 8,
12 2010, recorded by Recontrust, BAC was the creditor to whom the debt was owed. Subsequently,
13 Allstate Insurance Company, Mortgage Relations Center, sent a letter dated July 1, 2010 to Plaintiffs,
14 which informed them that the Plaintiffs’ homeowner’s insurance policy would be cancelled on
15 August 12, 2010 due to a change in lender and that Aurora, the new lender, had requested the
16 policy’s cancellation.

17 Plaintiffs were allegedly unaware that Recontrust was the purported successor trustee or that
18 BAC was the purported successor lender prior to Plaintiffs’ receipt of the Notice of Default.
19 Plaintiffs further allege that they were unaware that Aurora was also a purported successor in interest
20 until they received the Homeowner’s Policy cancellation notice from Allstate Insurance Company on
21 or about August 12, 2010. Additionally, Plaintiffs allege that MERS, Recontrust, BAC, and Aurora
22 were not assignees to the original note or debt identified in the Deed of Trust and that neither of these
23 Defendants had ever held an assignable interest in Plaintiffs’ debt on the Property, thus, none of
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25
26 ¹ The Court takes judicial notice of the public records adduced by Defendants (Doc. No. 12, Exs. A-
G). See Villa v. Silver State Fin. Servs., 2011 WL 1979868, at *1 (D. Nev. 2011).

1 them, according to Plaintiff, had the right to exercise the power of sale contained in the Deed of
2 Trust.

3 II. Standard for Motion to Dismiss

4 Under Fed.R.Civ.P. 12(b)(6), the Court may dismiss a complaint for “failure to state a claim upon
5 which relief can be granted.” In considering a motion to dismiss, “all well-pleaded allegations of material
6 fact are taken as true and construed in a light most favorable to the non-moving party.” Wyler Summit
7 Partnership v. Turner Broadcasting System, Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).
8 Accordingly, there is a strong presumption against dismissing an action for failure to state a claim. See
9 Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997).

10 To survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as
11 true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949
12 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible
13 “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
14 defendant is liable for the misconduct alleged.” Id. The plausibility standard is “more than a sheer
15 possibility that a defendant has acted unlawfully,” yet less than a “probability requirement.” Id.

16 Pursuant to the two-prong analysis in Iqbal, the Court first identifies “the allegations in the
17 complaint that are not entitled to the assumption of truth,” meaning, those allegations which are legal
18 conclusions, bare assertions, or merely conclusory. Id. at 1949-51. Second, the Court considers the
19 factual allegations “to determine if they plausibly suggest an entitlement to relief.” Id. at 1951. Only a
20 complaint “that states a plausible claim for relief survives a motion to dismiss.” Id. at 1950.

21 III. Analysis

22 In their Complaint, Plaintiffs implicitly allege wrongful foreclosure under N.R.S. § 107.080,
23 which governs nonjudicial foreclosures. Nevada recognizes the tort claim of wrongful foreclosure
24 where a homeowner alleges that a lender wrongfully exercised the power of sale and foreclosed upon
25 their property when the homeowner was not in default on the mortgage loan. See Collins v. Union
26 Fed. Sav. & Loan Ass'n, 662 P.2d 610, 623 (Nev. 1983). However, Plaintiffs do not dispute their

1 delinquency on the mortgage. Instead, they imply that the foreclosure was improper because of the
 2 securitization practices engaged in by Defendants.

3 A. Defendants' Lack of Standing to Foreclose

4 Under Nevada law, the foreclosure process is commenced by the recording of a notice of
 5 default by the beneficiary, successor in interest of the beneficiary, or trustee. N.R.S. § 107.080(2)(c).
 6 After at least three months have elapsed, the trustee or other person authorized to make the sale
 7 under the terms of the deed of trust shall give notice of sale in accordance with the posting
 8 requirements for residential foreclosures. N.R.S. § 107.080(4). A foreclosure sale may be declared
 9 void if the trustee or other person authorized to make the sale did not substantially comply with the
 10 foreclosure statutes. N.R.S. § 107.080(5). Here, Plaintiffs allege that Recontrust was not "authorized
 11 to foreclose upon the Property because MERS was not authorized to transfer the beneficial interest in
 12 the mortgage loan." See Complaint, ¶ 37.

13 The Deed of Trust lists MERS as a "nominee for the Lender and Lender's successors and
 14 assigns." See Defendant's Motion to Dismiss (Doc. No. 12, Ex. C, p. 3 of 30). Plaintiffs allege that
 15 MERS' authority as a "nominee" is limited to acting as a form of agent for the lender, which
 16 according to Plaintiffs, does not allow MERS to assign, transfer or otherwise convey any interest in
 17 the note or Deed of Trust to any other entity.

18 Black's Law Dictionary defines "nominee" as "[a] person designated to act in place of
 19 another, [usually] in a very limited way." Weingartner v. Chase Home Finance, LLC, 702 F.Supp.2d
 20 1276, 1279 (D. Nev. 2010). In short, "a nominee is an agent with limited powers, akin to a special
 21 power of attorney." Id. This applies to cases such as the present one, where an entity is nominated on
 22 a deed of trust by the holder of a promissory note, with the limited role of administering the deed of
 23 trust on the holder's behalf. Id. This definition indicates that a "nominee is a kind of agent working
 24 to the benefit of another." Id. In the present case, "that other person is the holder of the promissory
 25 note or its assigns." Id. Therefore, based on this definition, MERS, in its capacity as nominee, has the
 26 right to substitute a new trustee on the Deed of Trust. See id. at 1280.

1 Plaintiffs correctly note that MERS is not a beneficiary to the Deed of Trust and further allege
 2 that MERS has no standing to convey or transfer assignments. Courts within this jurisdiction have
 3 addressed the conflation of the terms “nominee” and “beneficiary” in boilerplate provisions within
 4 deeds of trust such as the one at issue here. These courts have concluded that:

5 Although MERS is not in fact the beneficiary, the attempt to name it as
 6 such...indicates an intent to give MERS the broadest possible agency on
 7 behalf of the owner of the beneficial interest in the underlying debt. Such
 8 agency would include the ability to sell the interest in the debt.

9 Villa v. Silver State Fin. Servs., 2011 WL 1979868, at *1 (D. Nev. 2011). Furthermore, the Deed of
 10 Trust explicitly states:

11 Borrower understands and agrees that MERS holds only legal title to the
 12 interests granted by Borrower in this Security Instrument, but, if necessary
 13 to comply with law or custom, MERS (as nominee for Lender and
 14 Lender's successors and assigns) has the right: to exercise any and all of
 15 those interests, including, but not limited to, the right to foreclose and sell
 16 the Property; and to take any action required of Lender, including but not
 17 limited to, releasing and canceling this Security Instrument.

18 See Defendants' Motion to Dismiss (Doc. No. 12, Ex. C, p. 3 of 15). This language is “clear
 19 enough... to indicate that the parties intended MERS would be able to transfer the beneficial interest
 20 in the underlying debt directly.” Villa, 2011 WL 1979868, at *1 (D. Nev. 2011). Furthermore, “it is
 21 even more clear that MERS may directly transfer the interest in the deed of trust itself...” Smith v.
 22 Community Lending, Inc., 2011 WL 1127046, at *2 (D. Nev. 2011). Accordingly, Plaintiffs have
 23 failed to allege any specific defect in the current foreclosure documents or proceedings prohibiting
 24 foreclosure under Nevada law.

25 Plaintiffs' allegation that foreclosure is improper because Defendants have failed to “possess
 26 and produce the...note to validate the powers vested under the Deed of Trust,” (Plaintiffs'
 Opposition, Doc. No. 14, p 8 of 18) fails because “defendants do not need to produce the note to the
 property in order to proceed with a non judicial foreclosure.” Clingman v. Somy, 2011 WL 383951,
 at *2 (D. Nev. Feb. 3, 2011). Case law within this district holds that N.R.S. § 107.080 “does not
 require a lender to produce the original note or prove its status as a real party in interest, [a] holder in

1 due course, current holder of the note, nominee of the current holder of the note, or any other
 2 synonymous status as a prerequisite to nonjudicial foreclosure proceedings.” Kwok v. Recontrust
 3 Company, N.A., 2010 WL 4810704, at *4 (D. Nev. 2010); see also Ritter v. Countrywide Home
 4 Loans, Inc., 2010 WL 3829378, at *3 (D. Nev. 2010) (“[T]he court has consistently held that NRS §
 5 107.080 does not require MERS or any other similar entity to show it is the real party in interest to
 6 pursue nonjudicial foreclosure actions.”).

7 The Court concludes that U.S. Bank properly acquired beneficial interest under Loan 1, and
 8 therefore, the notice of default issued by Recontrust, and the notice of trustee’s sale issued by
 9 Recontrust as substituted trustee, are apparently valid under Nevada statutes. Plaintiffs have therefore
 10 failed to allege any cognizable defect. See e.g. Berilo v. HSBC Mortg. Corp., USA, 2010 WL
 11 2667218, at *4 (D. Nev. 2010) (“[N]othing prevents an authorized agent from recording a notice of
 12 default. Nor does Nevada law require a substitution of trustee be recorded prior to a notice of
 13 default.”). Accordingly, Plaintiffs’ first cause of action is dismissed with leave to file an amended
 14 complaint.

15 B. Breach of Implied Covenant of Good Faith and Fair Dealing

16 Plaintiffs allege that Stearns breached the implied covenant of good faith and faith dealing by
 17 failing to comply with the foreclosure avoidance provisions of “Civil Code § 2923.5(a)(1)(2).” See
 18 Complaint, ¶¶ 44-45. The cited provision is found in California’s Civil Code, which does not apply
 19 to the present case. The Deed of Trust states that it is “governed by federal law and the law of the
 20 jurisdiction in which the property is located.” See Defendants’ Motion to Dismiss (Doc. No. 12,
 21 Ex. C, p. 12 of 30). Because the Property is located in Nevada, the foreclosure law of Nevada
 22 applies. Plaintiffs’ subsequent allegations apply to the aforementioned provisions in the California
 23 Code and therefore this claim fails as a matter of law.

24 Additionally, Plaintiffs allege that the loan agreements between Plaintiffs and Stearns
 25 contained an implied covenant of good faith and fair dealing, which obligated Stearns “to refrain
 26

1 from engaging in any conduct that would prevent Plaintiffs from fully enjoying the benefits of these
2 contracts.” See Complaint, ¶ 43.

3 Under Nevada law, “[e]very contract imposes upon each party a duty of good faith and fair
4 dealing in its performance and execution.” Larson v. Homecomings Financial, LLC, 680 F.Supp.2d
5 1230, 1236 (D. Nev. 2009) (citation omitted). However, “[a]s a general matter, a court should not
6 ‘conclude that a foreclosure conducted in accordance with the terms of a deed of trust constitutes a
7 breach of the implied covenant of good faith and fair dealing.’” Davenport v. Litton Loan Servicing,
8 LP, 725 F.Supp.2d 862, 884 (N.D. Cal. 2010). Plaintiffs fail to allege that Stearns acted contrary to
9 the purpose of the agreements at issue. Rather, Stearns, as lender provided Plaintiffs with a loan
10 amount which sufficiently covered the purchase price of the Property. Plaintiffs admittedly defaulted
11 on this loan, thus breaching the express and implied purpose of the agreements.

12 A claim for tortious breach of the implied covenant fails as well because an action under this
13 theory arises only in cases where a “special relationship” exists between a lender and a borrower.
14 Mackintosh v. Jack Mathews and Co., 855 P.2d 549, 554 (Nev. 1993). However, generally, “a
15 financial institution owes no duty of care to a borrower when the institution’s involvement in the
16 loan transaction does not exceed the scope of its conventional role as a mere lender of money.”
17 Jacobs v. Bank of America, N.A., No. C10-04596, slip op., 2011 WL 250423 (N.D.Cal. Jan 25,
18 2011) (quoting Nymark v. Heart Fed. Savings & Loan Ass'n, 231 Cal.App.3d 1089, 1095, 283
19 Cal.Rptr. 53 (1991)). Because Plaintiffs fail to allege that Stearns exceeded the scope of its role as a
20 lender; fail to allege that Stearns did not act in accordance with the Deed of Trust; and because
21 Plaintiffs cite to inapplicable statutory provisions, Plaintiffs’ second cause of action is dismissed with
22 leave to amend.

23 C. Fraudulent Misrepresentation

24 Misrepresentation is a form of fraud where a false representation is relied upon in fact. See
25 Pacific Maxon, Inc. v. Wilson, 619 P.2d 816 (Nev. 1980). To state a claim for fraudulent
26 misrepresentation in Nevada, a plaintiff must allege that (1) defendant made a false representation;

1 (2) defendant knew or believed the representation to be false; (3) defendant intended to induce
2 plaintiff to rely on the misrepresentation; and (4) plaintiff suffered damages as a result of his
3 reliance. See Barmettlo v. Reno Air, Inc., 956 P.2d 1382 (1998).

4 Fraud has a higher pleading standard under Rule 9, which requires a party to “state with
5 particularity the circumstances constituting fraud.” Fed.R.Civ.P. 9(b). Pleading fraud with
6 particularity requires “an account of the time, place, and specific content of the false representations,
7 as well as the identities of the parties to the misrepresentations.” Swartz v. KPMG LLP, 476 F.3d
8 756, 764 (9th Cir. 2007).

9 Plaintiffs raise N.R.S. § 205.372 as a basis for their Fraudulent Misrepresentation claim,
10 however, this statute and the entirety of Section 205 governs *crimes* against property. Criminal
11 statutes cannot form the basis of a civil suit without express civil enforcement provision. See Burgess
12 v. City and County of San Francisco, 49 F. App’x 122 (9th Cir. 2002). Accordingly, Plaintiffs’ third
13 claim for relief fails as a matter of law and is dismissed. However, the Court grants Plaintiffs leave to
14 amend their Complaint to state a claim for fraud with the specificity required by Rule 9(b).

15 D. Fraudulent Concealment

16 To establish a prima facie case of fraudulent concealment under Nevada Law, a plaintiff must
17 offer proof that satisfies five elements: (1) the defendant concealed or suppressed a material fact; (2)
18 the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally
19 concealed or suppressed the fact with the intent to defraud the plaintiff; that is, the defendant
20 concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than she
21 would have if she had known the fact; (4) the plaintiff was unaware of the fact and would have acted
22 differently if she had known of the concealed or suppressed fact; (5) and, as a result of the
23 concealment or suppression of the fact, the plaintiff sustained damages. See Nevada Power Co. v.
24 Monsanto Co., 891 F.Supp. 1406, 1415 (D. Nev. 1995).

25 Plaintiffs allege that during the loan application process, Defendants, failed to inform
26 Plaintiffs that “based on their stated income, credit rating, and net worth,” they were not qualified to

1 apply for the loan. See Complaint, ¶¶55-57. Plaintiffs further allege that Defendants “failed to
 2 independently verify Plaintiffs’ financial ability to repay the loan,” that Defendants knew or should
 3 have known that Plaintiffs were a very high risk of default and foreclosure, that Defendants
 4 concealed the risks and disadvantages of the loan’s adjustable interest rate, and that Defendants
 5 concealed the fact that Plaintiffs had a right to cancel or rescind the loan for a limited amount of
 6 time.

7 For mere omissions to constitute actionable fraud, a plaintiff must first demonstrate that the
 8 defendant had a duty to disclose the facts at issue. See Nevada Power Co. v. Monsanto, 891 F.Supp.
 9 1406, 1417 (D. Nev. 1995). “[A] duty to disclose arises from the relationship of the parties.” Id. “A
 10 fiduciary relationship, for instance, gives rise to a duty of disclosure.” Id. A duty to disclose may also
 11 arise where the parties enjoy a “special relationship,” that is, where a party reasonably imparts special
 12 confidence in the defendant and the defendant would reasonably know of this confidence.
 13 Mackintosh v. Jack Matthews & Co., 855 P.2d 549, 553 (1993). Absent such a relationship, no duty
 14 to disclose arises, and as a result, no liability for fraudulent concealment attaches to the
 15 nondisclosing party.

16 Here, Plaintiffs fail to allege whether any of the Defendants had a duty to disclose any of the
 17 aforementioned facts. Furthermore, as established above, the relationship between Plaintiffs and
 18 Defendants did not constitute a special relationship. Thus, Plaintiffs’ fraudulent concealment claim is
 19 dismissed with leave to amend.

20 E. Unjust Enrichment & Civil Conspiracy

21 Again, Plaintiffs raise Section 205 of the Nevada Revised Statute, specifically NRS §
 22 205.375, as a basis for this claim. For the aforementioned reason (see, supra, § C), Plaintiffs’ claim
 23 fails as a matter of law.

24 Additionally, a valid claim of unjust enrichment in Nevada requires that plaintiff show: (1) a
 25 benefit conferred on the defendant by the plaintiff; (2) appreciation by the defendant of the benefit;
 26 and (3) acceptance and retention of the benefit by the defendant under circumstances that would be

1 inequitable for him to retain the benefit. See Topaz Mutual Co., Inc. v. Marsh, 839 P.2d 606, 613
 2 (Nev. 1992). However, “[a]n action based on a theory of unjust enrichment is not available when
 3 there is an express, written contract, because no agreement can be implied when there is an express
 4 agreement.” Leasepartners Corp. v. The Robert L. Brooks Trust, 942 P.2d 182, 187 (Nev. 1997).

5 Plaintiffs allege that “Defendants’ [sic] failed to insure [sic] that Plaintiffs understood all fees
 6 and the true cost of their credit, retained benefits of charging higher interest rates, fees, rebates,
 7 profits (including but not limited to sale of mortgages and notes).” Complaint, ¶ 61. Additionally,
 8 Plaintiffs allege that Defendants used “Plaintiff’s [sic] identity, credit score and reputation without
 9 consent, right, justification or excuse as part of an unmeritorious enterprise scheme where
 10 Defendants were unjustly enriched by charging fees unrelated to the settlement services provided at
 11 closing.” Complaint, ¶ 61.

12 Plaintiffs fail to sufficiently plead an unjust enrichment claim because they entered into
 13 express contracts upon execution of the Deed of Trust and note in connection with their loans. For
 14 the reasons mentioned above, the subsequent lender, trustee and substituted trustee had standing to
 15 proceed with the nonjudicial foreclosure pursuant to the Deed of Trust. Accordingly, Plaintiffs’
 16 unjust enrichment and civil conspiracy claims are dismissed with leave to amend.

17 G. Unconscionability

18 Plaintiffs concede their unconscionability claim with respect to Defendants BAC and Aurora, yet
 19 maintain their claim against Stearns alleging that Stearns presented mortgage documents to Plaintiffs
 20 with the knowledge of Plaintiffs’ “inferior financial condition and credit history,” in a “take it or leave
 21 it manner,” thus affording Plaintiffs no opportunity to negotiate their mortgage interest or payment terms
 22 with Stearns. See Complaint, ¶ 66.

23 Unconscionability has both a procedural and substantive element. See Ting v. AT&T, 319
 24 F.3d 1126, 1148-49 (9th Cir. 2003); see also Flores v. Transamerica HomeFirst, Inc., 113 Cal. Rptr.
 25 2d 376 (Ct. App. 2001). The procedural element focuses on “oppression” or “surprise.” See Flores,
 26 113 Cal. Rptr. 2d at 381. Oppression arises from an inequality of bargaining power that results in no

1 real negotiation and an absence of meaningful choice. See id. Surprise involves the extent to which
2 the supposedly agreed-upon terms are hidden in a pre-printed form drafted by the party seeking to
3 enforce them. See id. A contract is procedurally unconscionable if it is a contract of adhesion, *i.e.*, a
4 standardized contract, drafted by the party of superior bargaining strength that relegates to the
5 subscribing party only the opportunity to adhere to the contract or reject it. Ting, 319 F.3d at 1149.

6 In Flores, defendant “unquestionably had superior bargaining strength in that it presented its
7 preprinted [loan] documents, cast in generic language, to plaintiffs for signature.” 113 Cal. Rptr. 2d
8 at 382. Additionally, plaintiffs were offered no opportunity to negotiate. Id. Ultimately, the Flores
9 court held that the arbitration clauses within the loan agreement and deed of trust constituted a
10 contract of adhesion because plaintiffs were offered no opportunity to negotiate. See id. Accordingly,
11 a finding of a contract of adhesion is essentially a finding of procedural unconscionability.

12 The Court does not find that the loan and Deed of Trust constitute a contract of adhesion.
13 Although the agreements were allegedly presented to Plaintiffs in a “take it or leave it manner” “the
14 mere fact that a contract term is not read or understood by the non-drafting party or that the drafting
15 party occupies a superior bargaining position will not authorize a court to refuse to enforce the
16 contract.” A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114,122 (Ct. App. 1982). “[A]n
17 argument can be made that contract terms not actively negotiated between the parties fall outside the
18 ‘circle of assent,’ which constitutes the actual agreement.” Id. “[C]ommercial practicalities, however,
19 dictate that unbargained-for terms only be denied enforcement where they are also substantively
20 unreasonable.” Id.

21 The substantive element of unconscionability has to do with the effects of the contractual
22 terms- whether the contract is drafted in a one-sided manner, or whether it provides a “modicum of
23 bilaterality.” Id. Here, an arbitration clause is not at issue, rather Plaintiffs take issue with (1) the type
24 of loan Defendants offered to Plaintiffs, (2) the material terms of that loan including, but not limited
25 to, the interest rate(s) and repayment schedule, and (3) the power of sale and right to foreclose in the
26 event of Plaintiffs’ default.

1 Plaintiffs allege that the agreed upon payment and interest rate resulted in a higher cost of
 2 financing than that reflected in the truth-in-lending payment schedule, yet later concede that they
 3 overvalued the Property, thus causing them to default on the loan. Because this second element of
 4 unconscionability rests on whether the effects of the contract terms were substantively unreasonable,
 5 a causal connection between the terms of the loans and Plaintiffs' subsequent default is necessary to
 6 sufficiently plead whether the loan and deed of trust were unconscionable. Because Plaintiffs fail to
 7 do so, the Court dismisses this claim, with leave to amend.

8 H. Quiet Title

9 In Nevada, a quiet title action may be brought "by any person against another who claims
 10 an...interest in real property, adverse to the person bringing the action, for the purpose of
 11 determining such adverse claim." N.R.S. § 40.010. In a claim for quiet title "the burden of proof rests
 12 with the plaintiff to prove a good title in [her]self." Velazquez v. Mortgage Electronic Registration
 13 Systems, Inc., No. 2:11-CV-576, slip op., 2011 WL 1599595, at *2 (D. Nev. Apr. 27, 2011)
 14 (quoting Brelant v. Preferred Equities Corp., 918 P.2d 314, 318 (Nev.1996)). Additionally, an action
 15 to quiet title requires a plaintiff to allege that she has paid any debt owed on the property. See
 16 Ferguson v. Avelo Mortgage, LLC. No. B223447, 2011 WL 2139143, at *2 (Cal. App. 2d June 1,
 17 2011). Essentially, "he who seeks equity must do equity." McQuiddy v. Ware, 87 U.S. 14 (1873).
 18 Although courts have power to vacate a foreclosure sale where there has been fraud, such as sham
 19 bidding and the restriction of competition, or inadequacy of price coupled with other circumstances
 20 of fraud in the procurement of the foreclosure decree, or where the sale has been improperly, unfairly
 21 or unlawfully conducted, "an action to set aside a trustee's sale for irregularities in sale notice or
 22 procedure should be accompanied by an offer to pay the full amount of the debt for which the
 23 property was security." Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App. 575, 578 (Cal. Ct. App.
 24 1984). See also FPCI RE-HAB 01 v. E & G Investments, Ltd., 207 Cal. App. 3d 1018, 1021 (Cal. Ct.
 25 App. 1989) ("The rationale behind the rule is that if plaintiffs could not have redeemed the property
 26

1 had the sale procedures been proper, any irregularities in the sale did not result in damages to the
2 plaintiffs.”).

3 Plaintiffs have failed to allege whether they were in the position to cure their default at the
4 time the Notice of Default and Trustee’s Sale was sent. This claim is therefore dismissed with leave
5 to amend.

6 I. Declaratory and Injunctive Relief


7 Plaintiffs have failed to show a likelihood of success on the merits, an essential element of a
8 claim for injunctive relief. See Benda v. Grand Lodge of the Int’l Ass’n of Machinists & Aerospace
9 Workers, 584 F.2d 308, 315 (9th Cir. 1978) (citations and quotations omitted). Furthermore, the
10 Court having dismissed Plaintiffs’ claims for breach of contract, quiet title, and wrongful foreclosure,
11 the Court dismisses Plaintiffs’ claim for declaratory relief as moot, but grants leave to file an
12 amended complaint.

13 IV. Conclusion

14 Accordingly, **IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss (#12) is
15 **GRANTED**;

16 **IT IS FURTHER ORDERED** that Plaintiffs shall file an amended complaint no later than
17 fourteen (14) days following the entry of this Order.

18 DATED this 29th day of July 2011.

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21 _____
22 Kent J. Dawson
23 United States District Judge
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